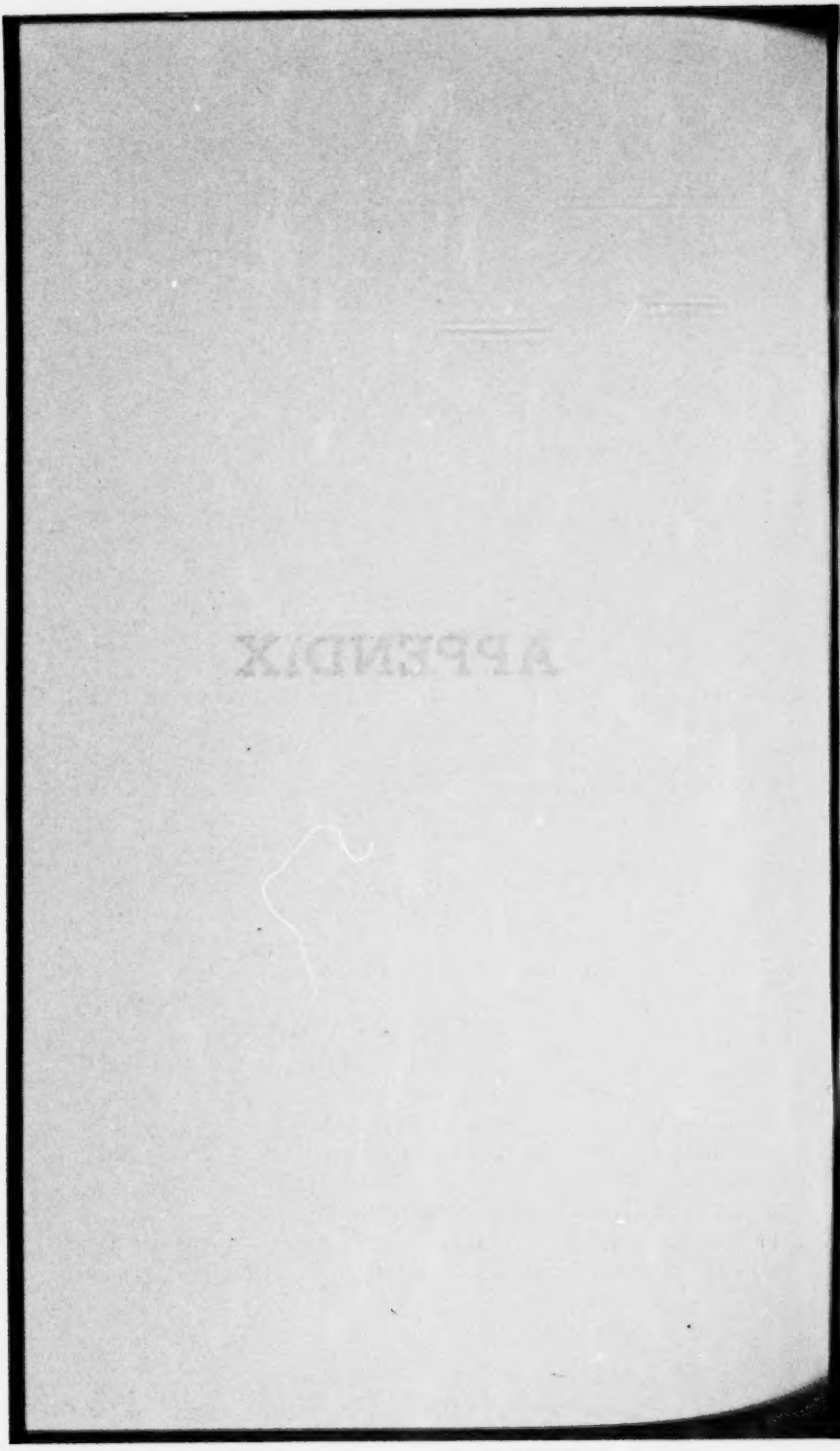

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APPENDIX A

ORDER OVERRULING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND MOTION FOR NEW TRIAL

Filed Jan. 6, 1954.

(Title Omitted.)

This is the second trial of this case. Each trial resulted in a verdict for the plaintiff in the same amount.

In a two to one decision the Court of Appeals granted the defendant a new trial after the first verdict upon the ground that this Court erred in not charging two requests to charge made by the defendant. These charges were again requested upon the second trial and were charged in the language requested.

As to the motion for judgment notwithstanding the verdict and the motion for a new trial based upon the general grounds, no discussion is necessary, since the law of this case was fixed by the Court of Appeals. That Court held that the evidence on the first trial presented a case for the jury. This Court observed the demeanor of the witnesses, what they said and their manner of testifying during the second trial very carefully and, if anything, the case made by the plaintiff was stronger, and the defense made by the defendant weaker, than upon the first trial. In the second trial, as upon the first, the defendant practically admitted the principal acts of negligence complained, of, its chief defense being that the deceased driver of the automobile could have avoided the consequences of defendant's negligence by the exercise of ordinary care. The only ground of contributory negligence contended for at either trial, however, was speed in excess of the limit permitted by a City Ordinance, to-wit: thirty miles an hour. At the second trial, however, defendant's principal witness as to speed swore positively and unequivocally on cross-examina-

tion that a minute or a minute and a half elapsed from the time he first saw the car at "L" Street until the collision occurred. See B. of Ev., page 416. The uncontradicted evidence was that the distance from L Street to O. Street, the scene of the collision, is exactly one-half mile. See B. of Ev., page 494. This positive and direct testimony of defendant's own witnesses therefore put the speed of the car at not in excess of thirty miles per hour.

There was no charge of drinking against the deceased at either trial and no mention of liquor at the first trial, but upon the second trial two witnesses who testified at the first trial, one of them the defendant's agent, testified that a small bottle of whiskey was found in the car (which had been borrowed by deceased from a friend to make the fatal trip) after the accident, one saying that he found it in the car on the night of the accident, and the other saying that he saw a policeman take it out of the car the next day.

The evidence was abundantly ample for the jury to believe that because of the peculiar and unusual meteorological conditions existing at the time and place of the accident, caused by a setting moon casting the mottled shadows of a large oak tree upon the dark, unlighted railroad equipment at a dark crossing overhung with tree limbs, an optical illusion or camouflaged condition was created which made it impossible for the automobile driver, in the exercise of ordinary care, to ascertain that the highway was blocked in time to apply his brakes and stop his car before the collision occurred. See Smith v. Swann, 73 Ga. App. 144, 35 S. E. (2d) 787 (4) and Fuller v. Steyermann, 46 Ga. App. 830, 169 S. E. 508.

The case was clearly one for the jury, as held by the Court of Appeals, and defendant's motion for judgment notwithstanding the verdict is therefore denied. See: Mann v. Central of Georgia Ry. Co., 43 Ga. App. 708, 160 S. E. 131; Rape v. Florida, Alabama and Georgia Ry. 47 Ga. App. 96, 169 S. E. 764; Central of Georgia Ry. Co. v. Mann, 48 Ga. App. 688, 173 S. E. 180; Courson v. A. B. & C.

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Ry. Co., 70 Ga. App. 318; 28 S. E. (2d) 313; Shelly v. Pollard 55 Ga. App. 88, 189 S. E. 570; Central of Georgia Ry. Co. v. Heard 36 Ga. App. 332, 136 S. E. 533; Gay v. Smith 51 Ga. App. 615, 181 S. E. 129; Southern Ry. Co. v. Lowry, 59 Ga. App. 109, 200 S. E. 553, and Southern Ry. Co. v. Riley 57 Ga. App. 26, 194 S. E. 422; Texas-New Mexico Ry. Co. v. Bailey, et al., 203 Fed(2) 647; U. S. v. Fleming, 115 Fed(2d) 314; Seaboard Ry. Co. v. Deese, 185 Fed(2d) 290; Watson v. Southern Bus Lines 186 Fed(2d) 981; A. C. L. R. R. Co. v. Soffer, 184 Fed(2d) 842; A. C. L. R. R. Co. v. Key, 196 Fed(2d) 64 (7); A. C. L. R. R. Co. v. Freeman, 193 Fed(2d) 217 (5); Southern Ry. Co. v. Harris, 123 Fed(2d) 7; Stanaland v. A. C. L. R. R. Co., 192 Fed(2d) 432.

Ground 1 of the amended motion for a new trial contends that the Court erred in refusing to declare a mistrial upon the ground that counsel for the plaintiff in his opening statement to the jury did not confine himself to an outline of relevant facts which he intended to prove but fully argued the case before any evidence was introduced. There is no merit in this contention. Furthermore, the Court took extraordinary pains upon the second trial to admonish the jury that they were not to consider any remarks made by counsel for either side which did not bear directly on the issues made by the pleadings and the evidence. See Hunter v. U. S., 264 Fed 831; Robelio v. U. S., 291 Fed 975 (20); U. S. v. Delaney, 8 Fed. Supp. 224; Smith v. State 204 Ga. 184, 188, 48 S. E. (2d) 860 (2); J. W. Starr & Sons Lumber Co. v. York, 89 Ga. App. 22, 29, 78 S. E. (2d) 429, 434.

Ground 2 of the amended motion contends that an aerial photograph of the crossing taken approximately one year and nine months after the accident should not have been admitted in evidence. The evidence was undisputed that there had been no change in the physical conditions at and surrounding the crossing between the time of the accident and the time the picture was taken. See B. of Ev., pages

61, 495 et seq., 86 et seq. It was therefore clearly admissible in evidence. See Sylvania Central Ry. Co. v. Gay, 82 Ga. App. 486, 488 (2); 61 S. E. (2d) 587, which is squarely in point.

Ground 3 contends that the Court erred in admitting in evidence testimony as to the condition of the crossing where the accident complained of occurred on an occasion about one month after the accident under conditions different from those existing at the time of the accident. The undisputed evidence was that the weather conditions and phase of the moon were substantially identical on both occasions and the evidence was therefore clearly admissible. See B. of Ev., pages 117 et seq., 188 et seq.

Ground 4 contends that the Court erred in allowing counsel for plaintiff to cross-examine his own witness Lyons as to matters about which counsel had not claimed he had been entrapped by the witness. There is no merit in this contention, as shown by the record. Furthermore, under the Rules counsel has the right to ask a hostile and unwilling witness leading questions without pleading entrapment. Rule 43 (b).

Ground 5 complains that the Court erred in permitting the plaintiff to call witness G. H. Martin for cross-examination. This witness was the conductor in charge of the train when the accident occurred. At the hearing on the motion for new trial counsel cited for the first time the case of Dowell, Inc., v. Jowers, 182 Fed(2d) 576, in which it was held that it was error for the Court to permit the plaintiff to call an employee of the defendant for cross-examination, but that the error was harmless and did not affect the substantial rights of the parties. If error at all, it was clearly harmless error not affecting the substantial rights of the parties to permit the train conductor to be called for cross-examination. He could have been called as plaintiff's own witness and asked leading questions as a hostile and unwilling witness under Rule 43 (b), which would have amounted to the same thing for all practical

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purposes. Plaintiff had already made out a prima facie case sufficient to shift the burden of offering proof to the defendant under Georgia law (Ga. Code Sec. 94-1108). The witness was examined by the defendant on direct examination following plaintiff's cross-examination and was cross-examined as to the matters brought out by plaintiff's counsel. In the Court's opinion the substantial rights of the parties were in no way affected by permitting the cross-examination of the witness to precede the direct examination even though this procedure may have been technically incorrect under the rules, contrary to the Court's opinion.

Grounds 6, 11 and 14 may be considered together. Section 94-505 of the Code of Georgia requires every railroad company to equip and maintain each locomotive used by such company on all portions of the railway line not used "solely as yards, spurs and side tracks" after dark with a good and sufficient headlight which shall consume not less than 300 watts at the arc and with a reflector not less than 23" in diameter and to keep the same in good condition. This means, of course, that the headlight must be turned on after dark and that it must be of sufficient strength to consume the required wattage. Ga. Ry. & Power Co. v. Belote 20 Ga. App. 454, 93 S. E. 62; Cosper v. A. C. L. 85 Ga. App. 683, 686, 69 S. E. (2d) 886; Mann v. Central of Ga. Ry. Co., 43 Ga. App. 708, 160 S. E. 131. The undisputed testimony, as well as the maps and photographs introduced in evidence, showed that this was an East-West cross-town track crossing some 10 or 12 parallel city streets and connecting the main line track of the defendant railroad company with the main line track of the Southern Railway Company. It forms part of a large "Y" on the west side which was used for reversing the direction of trains and in addition the track was frequently used for making all kinds of cross-town movements of trains. This was the testimony of defendant's own witnesses, both upon the first trial and upon this trial. B. of Ev., pages ..., 301, 302. There is no basis whatever under the evidence for the contention that no headlight was required on the engine

after dark because the railway line in question was used "solely as yards, spurs and side tracks".

Grounds 7 and 10 may be considered together. They complain that the Court erred in refusing to declare a mistrial on the ground that counsel for the plaintiff continued to refer to blinker lights at Pyles Marsh (another crossing in Glynn County) and to another accident there, after the Court had ruled out any testimony as to same. There is no merit in these grounds of the motion. The Court has no recollection of any continuous reference by counsel to the Pyles Marsh crossing or other crossings, and in addition the Jury was expressly admonished by the Court to disregard any reference to any crossing or crossing accidents other than the one involved in the case at bar. See cases cited elsewhere in this opinion on question of Court's discretion with reference to granting a mistrial because of remarks by counsel. See also A. C. L. v. Hadlock, 180 Fed (2d) 105 (4) (5th Cir.).

Ground 8 complains that the Court erred in admitting in evidence plaintiff's Exhibit No. 32 and testimony by the witness Gardner with reference thereto. There is no merit in this contention. This was rebuttal evidence introduced to impeach one of defendant's witnesses who attempted to estimate the speed of deceased's car solely by its appearance after the accident. It was clearly admissible for this purpose for whatever weight the jury might wish to give it.

Ground 9 complains that the Court erred in refusing to declare a mistrial upon the ground that plaintiff propounded questions to various witnesses which were allegedly "immaterial, irrelevant, inflammatory and prejudicial" and then withdrew the questions on objections made by the defendant before any ruling by the Court. There is clearly no merit in this contention since there was never any ruling by the Court as to whether or not the questions were immaterial, etc., as contended by defendant. It was clearly the right of counsel to withdraw the questions objected to before a ruling by the Court and certainly the mere asking

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of an immaterial question cannot constitute grounds for a mistrial. In addition the jury was admonished by the Court to disregard any and all such questions as well as any and all evidence ruled inadmissible by the Court. On the question of the discretion vested in trial judges under Georgia law in the matter of declaring mistrials because of remarks made by counsel, see Smith v. State, 204 Ga. 184, 188, 48 S. E. (2d) 860; J. W. Starr & Sons Lumber Co. v. York, 89 Ga. App. 22, 29; 78 S. E. (2d) 429, 434 and the Federal cases cited above.

Ground 12 complains that the Court erred in charging the Jury that the defendant has the duty of exercising ordinary diligence to avoid doing injuries to persons or property which may be lawfully upon its public grade crossings in cities, towns or villages.

This charge was complained of in the first trial and was not held to be error by the Court of Appeals. The charge is in the language of the decision in the case of Driskell v. Powell, 67 Fed (2d) 484 (3) (5th Circ.) in which it was held that "the railroad, while it has the crossing obstructed, should use reasonable care that the obstruction does not injure travelers upon the street". See also: S. A. L. Ry. Co. v. Benton 43 Ga. App. 495 (3), 497, 159 S. E. 717, 719; Mann v. Central of Ga. 43 Ga. App. 708, 711, 160 S. E. 131; A. C. L. v. Freeman, 193 Fed (2d) 217 (3), A. C. L. v. Pidd 197 Fed. (2d) 153 (1). In the case at bar the conductor admitted that he knew this was a very dark crossing and he knew that the moon was casting shadows of a large oak tree on the equipment. B. of Ev., 272 et seq. He admitted that he had lanterns at hand to be used for protecting dangerous crossings when they were blocked. (B. of Ev., pages 291; 297 et seq.) He admitted that he had fuses which were sometimes used for giving warning to travelers on the street of a blocked crossing. (B. of Ev., page 259.) He admitted that if the headlight had been turned on it would have given some warning of the existence of the obstruction, and the only reason that it

was not turned on was for the convenience of the engineer. (B. of Ev., page 275; 299.) The jury was certainly authorized to find under this evidence that the crew knew that because of the unusual circumstances existing some extra warning, other than the unlighted train itself, should have been taken to warn travelers on the street that it was blocked. The facts in this case are quite similar to those in the case of Texas-New Mexico Ry. Co. v. Bailey, et al., 203 Fed (2d) 647, in which the Court of Appeals for the 5th Circuit upheld a verdict for the plaintiff. If anything, the facts in the case at bar are stronger for the plaintiff than they were in the case cited. See also the case of Atlantic R. R. Co. v. Dickson, 70 Ga. App. 590, 28 S. E. (2d) 879 (2), the case of A. C. L. v. Key, 196 Fed (2d) 64 (2), the Mann case cited above, and several of the others cited, in the first of which it was held that "the rights, obligations and duties of the railroad and travelers at public crossings are mutual and reciprocal."

Ground 13 complains that the Court erred in refusing to charge the Jury that in the absence of any evidence to the contrary, it may be reasonably presumed that the deceased was familiar with the crossing. The Court knows of no authority for such a proposition of law, and none has been cited to him. The complaint alleged that deceased was unfamiliar with the crossing and there was evidence from which the jury was authorized to find that deceased, who was driving a borrowed car, was not familiar with the crossing, which was located two miles or more from his home and which was not on the route traveled by him on his way to work.

This Court having heard the evidence in this case on two trials and having carefully observed the witnesses, considered their testimony, their manner of testifying and their demeanor on the stand, and having carefully studied the pictures, maps and other exhibits tendered in evidence, is of the opinion that the Jury was authorized to find that plaintiff's 24-year-old son was killed as the result of the

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wanton negligence of the defendant, its servants, agents and employees. The verdict rendered in the case on both trials was for a modest sum compared to what the jury would have been authorized to find under the law of Georgia considering the age, earning capacity and future prospects of the deceased as shown by the undisputed evidence. This Court is of the opinion that the verdict was fair and just under the facts of this case.

The motion for judgment notwithstanding the verdict and the motion for new trial are hereby overruled and denied on each and every ground thereof.

This January 6, 1954.

(S.) F. M. SCARLETT,
Judge United States District Court, Southern District of of Georgia.

APPENDIX B

Opinion of the Court of Appeals

Filed January 7, 1955

Before HUTCHESON, Chief Judge, and HOLMES and RUSSELL, Circuit Judges.

HOLMES, Circuit Judge: This is the second appearance of this case before us on appeal. The prior judgment was reversed because of the error of the court below in refusing to give certain instructions requested on behalf of the defendant. 205 F. (2) 525. We adhere to our ruling on the former appeal that this is not a case for punitive damages, and that the real question as to liability is one of comparative negligence. We also adhere to what was said in our former opinion about the impropriety of allowing an opening statement by counsel to be converted into a lengthy argument on the merits of the case, which tends to create such an atmosphere of bias or prejudice in the court

room as to render it difficult for the jury to listen to the evidence with an open mind.

This action was instituted under the wrongful death statute of Georgia; it involves a grade crossing accident, occurring about 1:30 A.M. in Brunswick, Georgia, which resulted in the death of appellee's son, who drove his automobile into the side of a train that was occupying the crossing on a clear night, with the moon, almost ready to set, shining through the large oak trees. In his opening statement to the jury, the plaintiff's attorney did not confine himself to a simple statement of the issues presented by the pleadings, or to the facts that he intended to prove by the witnesses, but he went further and made an inflammatory speech to the jury upon the merits of the case, discussing both the law and the facts in strong language and stating facts that would be clearly inadmissible in evidence. This purported opening statement began on page 132 and ended on page 169 of the printed record. The opening statement on behalf of the defendant covered almost exactly 3 pages.

It would be hard to overstate the prejudicial effect of this method of trying a lawsuit. There was no surviving eye witness to this terrible accident. The deceased was traveling alone, and there were no cars behind him. There were five members of the train crew: conductor, fireman, engineer, and two flagmen; but none of these saw the automobile before the accident, except the fireman testified that he got a glimpse of it just before the crash.

After the jurors were accepted, sworn, and impaneled, to sit as impartial triers of the facts, they were required to listen to a lengthy speech upon the alleged law and the facts of the case, the former not given them by the court and the latter not testified to by any witness. The plaintiff's attorney read from Georgia statutes as to the full value of a child's life that had been snuffed out by the inexcusable negligence of the defendant. The point he allegedly wished to bring to the jury's attention was that

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a penalty was imposed upon a person who caused the death of another by negligence. He said: "The penalty goes to the person who is authorized to sue for the negligent homicide. It is penal in that the measure of the recovery is the full value of the life of the deceased, irrespective of its real value to the person in whom the cause of action is vested."

Then followed an argument between counsel, interspersed with interrogatories by the court, as to whether the plaintiff was suing under the old law or the new one. The plaintiff's attorney said there was a question in his mind whether it was the same law or not. He did not want the court to rule on it now; it might not come up. Finally, the plaintiff's attorney said: "If your Honor please, I am trying to tell this jury that we are going to prove to them beyond any peradventure of doubt that this young man was killed by the most inexcusable negligence that they have ever experienced in the Court House. We are going to prove that." This statement was objected to as highly argumentative and prejudicial, and the objection was overruled. The court also refused to declare a mistrial, as requested by the defendant. The attorney for the plaintiff then continued as follows:

> "As I was about to say to you, gentlemen, we expect to show to you by overwhelming evidence in this case that this young man was 24 years old, just a young man, and was living with his *invalid* father . . . that he was one of the most promising and finest young men in the City of Brunswick . . . that the life of that young man was snuffed out in the twinkling of an eye . . . Now, Mr. Conyers has already started to objecting . . . , I have no prejudice or bias against the railroad. I have been counsel for the Southern Railroad myself."

The court sustained the objection to the above, and plaintiff's attorney said: "If he is not going to let me say anything, suppose I just read the plaintiff's petition." But

he did not do that. He said: "All right, your Honor. I don't want anything in this record this time. I want to do anything and everything Mr. Conyers wants me to do. You will see that map later, Gentlemen. Anyway, gentlemen of the jury, this young man was driving his friend's automobile that morning to pick up his sweetheart, who worked in a restaurant in Arco, and who got off at 2 o'clock." Then he went on to tell that young Kammerer was very much in love with her and would go out every morning to take her home, going into unnecessary details, stating matters not admissible in evidence. Sometimes he appeared to be testifying as to facts within his own knowledge; and, when objection was made, sometimes the court would sustain the objection, but generally it would hold that if he was going to introduce evidence to prove the facts stated, he could tell it in his opening statement. Then would follow a torrent of words, which cover pages in the record, about this fine young man who was "absolutely sober on this occasion" and who "drove that car just as straight as he could go between the front of the engine and a box car that was hitched on to the front of the engine."

"In other words," he said, "the railroad had parked this engine with a box car in front of it in line of his vision, and the boy without ever putting on any brakes . . . drove that car just as straight as a martin to his goal right into what we will contend was a death trip." The attorney told the jury in no uncertain terms whether or not this young man was sober, saying: "Now, he was absolutely sober on this occasion." Then followed several pages of argument upon the negligence of the railroad and its employees, winding up with a plea to the jury to give this case the most careful consideration, because "the only reason they give us is that this boy was running too fast." The opening statement was about one-third over at this time, and counsel seemed to shift his role from attorney to witness. He said:

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"Mr. Kammerer and I went out to the same place 29 nights later when the almanac showed that the moon was exactly in the same phase it was the night this boy was killed. He [we] went out there to see just what the situation was. We knew there had to be something very unusual out there, or the boy would have put on his brakes at the last minute. Something was wrong because he never saw that train. There were no skid marks of any kind. He just went right straight into that train. We took a group of men, two policemen any [and] two or three other men out there to see what was the trouble and we found it.

"Now, the railroad, the conductor and the engineer admit that they knew that thing existed out there but did not take any kind of precaution that would protect the public against it.

"Now, here is what happened, what the situation was; that crossing, as the pictures will show you, is completely overhung with a low hanging oak tree branches that came right down to the height of a box car—came right down to the height of the box car. It was dark out there. It was almost a forest you might call it. This track comes out of a sort-of a jungle on to this street, and this engine was sticking out about three feet over on the paved part of Albany street. The old oak tree over-hangs it there. It over-hangs the only old sign there. They do not pretend to have a regular crossing sign. They just have one of these old basket ball washed out signs. They don't pretend to have a regular legal crossing sign, although it is the law of Georgia to have it."

All this arguing and witnessing continued until another objection was raised and the court had not heard exactly what was said by the plaintiff's attorney. No wonder the court "didn't catch just exactly what was said"; but we cannot presume that the jurors failed to catch it. The attorney then began to read the pleadings, which are of a

character that Stephen on Pleading calls an endless wrangle on the record. He would read a while and talk a while, interspersing any argument that occurred to him. With an air of patience and generosity, he brushed aside all objections of opposing counsel, all the mild admonitions of the court, and continued in the same tenor to the end of his opening statement. After a brief statement of what he expected to prove, the attorney for the defendant renewed his motion for a mistrial, which the court overruled, saying: "I admonished the jury not to consider anything counsel said unless it was what he intended to prove by relevant and competent evidence." At this point the proceedings were adjourned, and the jury excused, until 10 o'clock the next morning, not a line of evidence having been introduced but the minds of the jurors having been filled with unsifted facts as to the alleged negligent death of this man.

In *Maryland Casualty Co. v. Reid*, 76 F. (2) 30, 33, Judge Hutcheson says that it is the duty of a judge not to let the trial of a lawsuit get out of bounds, and that is exactly what happened in this case. Too much of the trial took place out of bounds. If an objection was made to one of his questions, the attorney for the plaintiff would often withdraw it; but the damage was done by merely asking the question. It would be unreasonable to expect the jurors to remember the court's instructions to disregard all the things said by the plaintiff's attorney that the court had told them to disregard. In his closing argument, the attorney said to the jury: "I don't know how many boys have been killed or injured as a result of the operation of this railroad in and around Brunswick. I know of three that were killed in one car." Objection was made and motion for a mistrial made; but the court overruled the motion after instructing the jury to disregard any other accidents that might have happened in connection with this railroad. (See Appendix.)

The same attorney also repeatedly asked the jury to bring in a verdict that would shock the defendant into do-

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ing something about this operation, sometimes referring to it as this arrogant railroad company. This was both before and after he told the jury of three boys being killed in one car, "besides this one."

Too many errors infect this verdict for it to be permitted to stand. The judgment appealed from is reversed, and the cause remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED.

Appendix

The following is from the argument to the jury in the closing speech on behalf of the plaintiff, pages 660 and 661 of Vol. 2 of the Record:

"Argument on behalf of the Plaintiff.

"By Mr. E. Way Highsmith:

"May it please the Court, and you gentlemen of the jury: I don't know whether you gentlemen read the same Bible rules or not, but I want to quote you one: 'Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the Prophets.'

"I read that this morning to my wife and three boys. I said, 'Well, I am going to take that as my text this morning before that jury.' I am going to do my best to point out to you gentlemen by simple reasoning that this railroad company not only doesn't adopt one fragment of that teaching of the lowly Nazarene, but on the contrary it seems to have a rule of conduct in its operation of its railroad in Brunswick that is directly and diametrically opposed to it, and that in my weak and humble way I am going to try to get this jury to bring in a verdict in this case that will help the people of Brunswick in some degree by making this

arrogant railroad company adopt the Golden Rule in its operation of its railroad. Some of you gentlemen are from Brunswick and some of you are not, but I don't know how many boys have been killed or injured, as a result of the operation of this railroad in and around Brunswick. I know of three that were killed in one car, besides this one."

"Mr. Conyers:

"Now, may it please the Court, I object to that statement and move for a mistrial on the basis of the statement that Mr. Highsmith has just made with reference to other deaths in Glynn County on account of the operations of the defendant's trains.

"The Court:

"Gentlemen of the jury, of course any other accident that might have happened in connection with the Atlantic Coast Line Railroad Company would not be admissible in this case. So, you gentlemen confine yourself to the evidence in this case, and don't consider any statement counsel made about that.

"Mr. Conyers:

"Does the Court overrule the motion?

"The Court:

"With that admonition I overrule your motion.

"Mr. Conyers:

"I except to Your Honor's ruling.

"The Court:

"All right."

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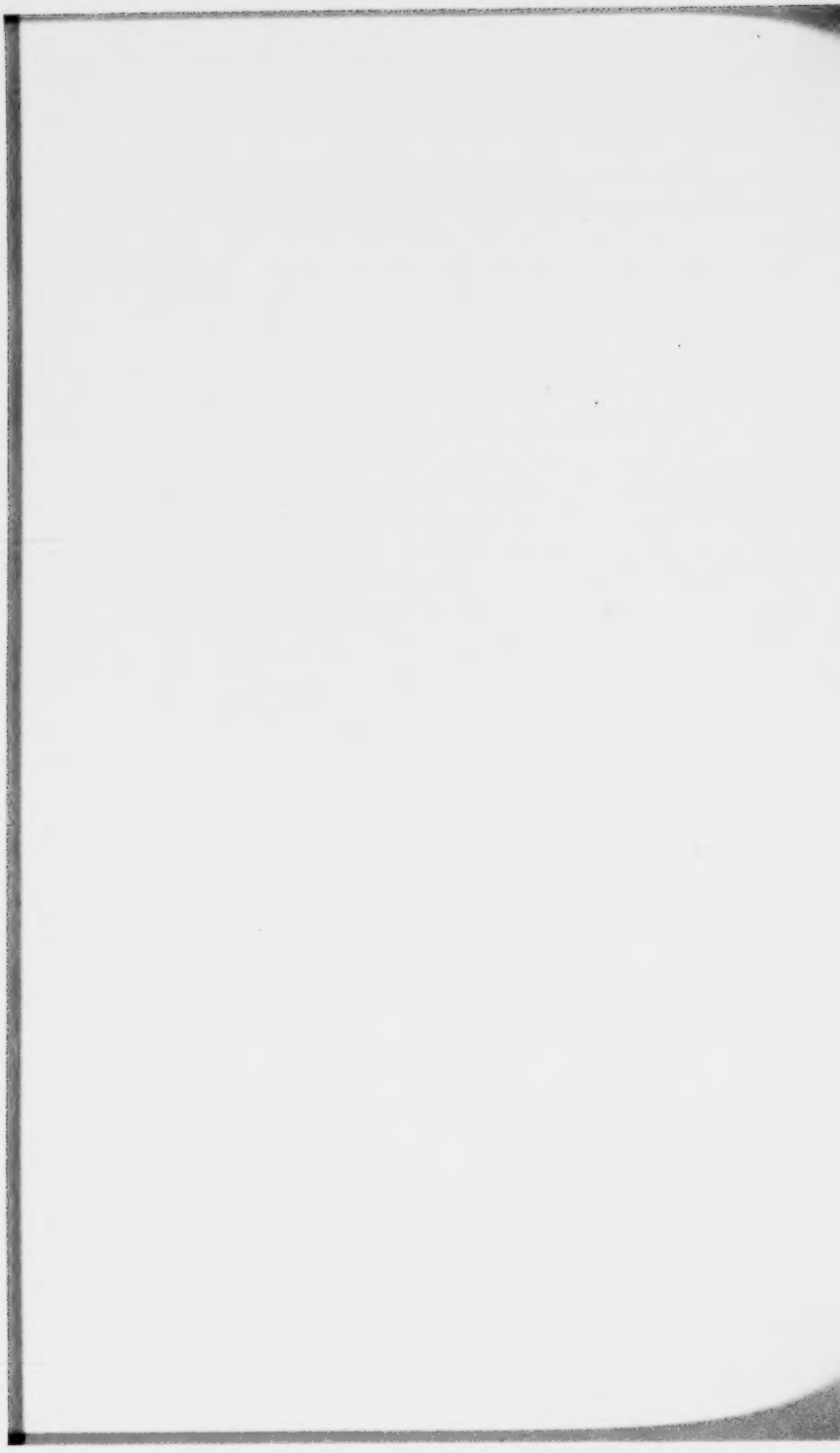
APPENDIX C

JUDGMENT OF COURT OF APPEALS, January 7, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that said cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Albert Gregor Kammerer, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 683

ALBERT GREGOR KAMMERER, *Petitioner,*

v.

ATLANTIC COAST LINE RAILROAD COMPANY, *Respondent.*

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR CERTIORARI

Petitioner contends that this case merits review because the Court of Appeals invaded the sphere of the trial judge and the jury in violation of the decisions of this Court and other Circuits. Respondent's Brief in Opposition by its omissions emphasizes that review is appropriate here.

The brief nowhere challenges or even discusses the cases cited in the petition which established that the Court of Appeals decision was contrary to the decisions of this Court. It quarrels with the verdict of the jury *on the merits.* But the brief, signed by trial counsel, does not deny that the trial judge maintained complete control over proceedings in his court, despite the contrary view set forth in the Court of Appeals opinion.

The brief in opposition consists almost entirely of:

(1) A statement of the *facts* which attempts to show that the accident was the fault of petitioner's son, although this issue was twice determined to the contrary by the jury (pp. 2-7);

(2) A lengthy argument that, *under Georgia* law, both the trial court and the Court of Appeals erred in failing to grant defendant's request for judgment n.o.v. on the ground that the death of petitioner's son was due to his own negligence (pp. 7-13);

(3) A quotation in extenso from a decision on improper argument by this Court, which is beside the point because that case turned on the failure of the trial judge to take corrective action (pp. 14-17). In the present case the trial court took special pains to correct any allegedly improper effect of counsel's arguments (see Petition pp. 5-7); and

(4) A complaint that, although the trial judge properly instructed the jury to disregard statements outside the record, it did not rebuke counsel who made the statement (pp. 17-19).

In sum, the brief in opposition represents merely a quarrel with the jury's verdict and with decisions on the applicable principles of Georgia law as applied by both lower courts. That brief thus establishes that the issue was a matter for the jury, and that the Court of Appeals erred in setting the verdict for counsel's argument, in violation of the rules laid down by this Court and by other Circuits.

WHEREFORE, the petition should be granted and the judgment reversed with directions to reinstate the verdict of the jury.

THURMAN ARNOLD,
E. WAY HIGHSMITH,
Attorneys for Petitioner.

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